UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

November 21, 1996

MICHAEL K. LEE,	)	
Complainant,	)	8 U.S.C. § 1324b Proceeding
	)	
v.	)	OCAHO Case No. 96B00063
	)	
AIRTOUCH COMMUNICATIONS	)	
Respondent.	)	

ORDER OF DISMISSAL AND
SCHEDULE FOR BRIEFING ON ATTORNEYS FEES REQUEST

PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act, 8 U.S.C. § 1324b (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), in which Michael K. Lee is the complainant and AirTouch Communications[1] is the respondent. John B. Kotmair, Jr., Director of the National Workers Rights Committee, signed the complaint on Lee's behalf, and subsequently filed a Notice of Appearance together with a power of attorney signed by Lee to authorize the representation.

The complaint alleges that Lee is a United States citizen, but does not disclose his national origin. It states that AirTouch discriminated against Lee on October 6, 1995 by firing him because of his citizenship status and national origin, because "[h]e did not have a social security number to present pursuant to the company's requirement in violation of Title 8 § 1324b(6)." Boxes are checked answering "yes" to the following statements:

> I was qualified for the job but was fired anyway,
>
> Although I was fired, other workers in my situation of different nationalities and citizenship were not fired,
>
> The Business/Employer refused to accept the documents that I presented to show I can work in the United States.[2]

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[1] Although named in the complaint as Airtouch Communications, AirTouch Cellular is respondent's correct name.

[2] The documents which AirTouch allegedly refused to accept are identified as "Statement of Citizenship (stating he is a U.S. citizen and is not subject to withholding of income taxes under

> The Business/Employer asked me for too many or wrong documents than required to show that I am authorized to work in the United States.[3]

The complaint thus raises issues as to three different varieties of discrimination: discrimination based on national origin, discrimination based on citizenship status, and discrimination based on acts of document abuse which are deemed to be discriminatory by 8 U.S.C. § 1324b (a)(6).

The complaint further alleges that Lee had filed a charge with OSC on November 24, 1995 and received a letter from OSC authorizing him to file a complaint within 90 days with the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint was timely filed. A timely answer was filed on August 2, 1996, which asserted twelve affirmative defenses and also requested attorneys fees. The answer denied that respondent fired complainant at any time, but admitted failing to hire him as a Senior RF Engineer because he refused to supply AirTouch with a social security number for income reporting and tax withholding purposes.[4] It denied further that other workers in complainant's situation of different nationalities and citizenship were not fired or that they were hired. It denied refusing to accept any documents presented to show that complainant could work in the United States, and denied further that Lee's purported documents were presented for that purpose. AirTouch admitted that it refused to accept the tendered documents as proof complainant was not covered by laws requiring employers to report their employees'social security numbers and income, and to withhold taxes. It denied asking complainant for too many or wrong documents, or any documents at all to show complainant was authorized to work in the United States, and also denied specifically ever asking for the social security card at all. It admitted asking for a social security number to comply with tax laws but denied asking for it as proof of authorization to work in the United States.[5]

On August 30, 1996 I issued an order of inquiry directed to various factual questions bearing on the issues of jurisdiction, of whether a prima facie case has been stated, and of the qualifications of Mr. Kotmair to undertake representation of Lee. Both parties responded to the

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Federal Law)" and "Affidavit of Constructive Notice (He does not have an SSN and is not subject to the Social Security Act.)."

[3] The document allegedly requested was identified as "social security number/card."

[4] Whether characterized as firing or as refusal to hire, it appears undisputed that respondent made an offer of employment which complainant accepted, and that complainant duly reported for work on the agreed start date of September 7, 1995.

[5] Respondent further stated inter alia in defense that complainant gave conflicting explanations of his refusal to give the social security number, and also altered provisions in his application.

order of inquiry. My order also gave respondent 10 days after the filing of Mr. Kotmair's statement of qualifications in which to object to the representation. Respondent filed a timely opposition to the appearance of Mr. Kotmair and a request for his exclusion, together with attached exhibits.

On September 10, 1996, AirTouch filed a motion to dismiss for failure to state a claim upon which relief can be granted with a memorandum in support of the motion, exhibits showing the number of employees, and the affidavit of Claire Soderburg. Respondent also reiterated its request for attorneys fees. No timely response has been made to this motion.[6] On October 10, 1996, complainant filed Complainant's Reply to Respondent's Affirmative Defenses.

The motion to dismiss is ripe for ruling.

THE ORDER OF INQUIRY

The specific questions posed by the order of inquiry were as follows:

I. BOTH PARTIES

1. Both parties are requested to provide any information in their possession and/or documentary evidence as to the number of employees at the San Diego market office of AirTouch Cellular in 1995 and in 1994.

2. Both parties are requested to address the question of what steps, if any, were taken for the purpose of completing Form I-9 in connection with the potential employment of complainant by respondent.

3. Both parties are requested to address:
   a. Was any charge filed with EEOC against AirTouch based on the same facts and circumstances here alleged:

   b. If so, is the EEOC charge currently pending based on these facts?

   c. If such a charge was filed, indicate:
      1. when it was filed,
      2. where it was filed,
      3. what disposition if any was made, and
      4. what is the current status of the charge?

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[6] OCAHO Rules of Practice and Procedure, 28 C.F.R. Part 68 (1995), a copy of which was furnished to both parties, provide that a party has 10 days in which to respond to a written motion. 28 C.F.R. § 68.11(b).

II. COMPLAINANT

1. Complainant's representative is requested to file a statement detailing his qualifications to undertake the representation.

2. Complainant is requested to answer the following:
   a. Does complainant contend that non-citizens are employed by AirTouch who have not been required to furnish social security numbers as a condition of their employment?

   b. Does complainant contend that persons having a national origin other than in the United States are employed by AirTouch who have not been required to furnish social security numbers as a condition of their employment?

   c. Does complainant contend that AirTouch requested a social security number (or a social security card) for any purposes other than complying with relevant tax laws?

   d. If so, does complainant contend that respondent requested his social security number or a social security card to establish his
      1) identity?
      2) eligibility to work in the United States?
      3) both identity and eligibility to work in the United States?

THE RESPONSES OF THE PARTIES TO THE ORDER OF INQUIRY

Both parties responded to the order of inquiry in a timely manner. Complainant's submission, totaling 26 pages, contained "corrections" to my recitation of the procedural history and a rebuttal to my statement of the governing law, as well as an explanation of his own understanding of the law, but, as noted infra, few specific factual responses to the questions asked.

1. The Number of Respondent's Employees

The first inquiry posed a question about the number of employees at respondent's San Diego market, the facility at issue in this proceeding, in order to ascertain whether OCAHO had any jurisdiction over the allegations of national origin discrimination. Complainant's OSC charge form shows on its face that complainant himself had checked the box indicating respondent had more than 15 employees. The order of inquiry also inquired as to whether any charges were filed with the EEOC based on the same facts and circumstances, because there is no overlap of jurisdiction between the two agencies.

AirTouch's response to the first question of the order of inquiry indicates that in January 1994 their San Diego market had 208 employees, and by the end of 1994 that number was 263, 36.7 of whom were temporary workers. By the end of 1995 the number was 335.5, 67.5 of

whom were temporary workers. Respondent stated that at no time during 1994 or 1995 was the number of employees at the San Diego facility less than 200. AirTouch had no information about any EEOC charge based on the same facts.

Complainant's response to the order concedes that OCAHO has no jurisdiction over the national origin claims. It states further that an attempt to file an EEOC charge based on the same facts on October 31, 1995 was refused on the grounds that the potential charging party lacked standing, not because the commission lacked jurisdiction, and states further:

> It is understood by the Complainant that the law limits these proceedings in matters of national origin discrimination to matters where the employer employs between 4 and 14 employees. Therefore, in this case the Complainant is abandoning his claim of discrimination due to national origin despite its great connection to his citizenship of the United States of America, and will instead focus on the discriminatory actions against him as a U.S. Citizen and the document abuse charge.

It thus appears to be undisputed that AirTouch's San Diego market had more than 200 employees at all relevant times.

2. Whether Respondent Was Treated Differently from Other Employees

A box on the complaint form was checked indicating that although Lee was fired, other workers in his situation of different nationalities or citizenship were not fired. I therefore posed an inquiry to ascertain whether Lee was alleging specifically that there were other employees who refused to provide social security numbers and who were treated differently, because it was unclear from the complaint what workers, if any, Lee was alleging were "similarly situated."

In response to questions II 2.a, "Does complainant contend that non-citizens are employed by AirTouch who have not been required to furnish a social security number (or a social security card) as a condition of their employment?", and II 2.b, "Does complainant contend that persons having a national origin other than in the United States are employed by AirTouch who have not been required to furnish social security numbers as a condition of their employment?", complainant answered:

> 2.a This question is off point, as disparate or differential treatment does not eliminate the protected status of a U.S. citizen, and their protected and peculiar rights as it was shown and seen by the U.S. Supreme Court and as revealed in federal law.
>
> 2.b. Same as the above answer for 2.a.

In addition to being unresponsive to the question, this response misses the point of the inquiry. These questions were asked in order to provide the complainant with the opportunity to explain

the allegation in the complaint that other workers "in his situation" were not fired. Absent any facts alleged from which it may be inferred that other employees or applicants were treated differently from the complainant, I conclude there were no such workers or applicants.

3. Steps in the Hiring Process

I inquired whether the proposed employment of complainant had reached the stage of completing an I-9 form because the regulatory scheme and the regulations implementing the employment eligibility verification system provide the framework within which claims of document abuse must be assessed. In response to the inquiry as to what steps, if any, were taken for the purpose of completing Form I-9 in connection with complainant's alleged employment by respondent, complainant stated:

> The Complainant has no knowledge of any steps being taken for the purposes of completing a Form I-9 in connection to the employment procedure in question here. Complainant also finds this question off point to the fact of the authority of the ALJ under 8 U.S.C. 1324b(a), proving full power and authority over employment practices, and that the legal fact that refusal to honor documents by an employer as set forth in the law is not in any way connected to the I-9 requirement in accordance with the authority of ALJ in 28 C.F.R. § 68.52(c)(2)(i)(K) (*supra*), gives the ALJ full authority over all of the facts of this matter as contained in the complaint and this clarification of the record.

Respondent stated in response to the inquiry that it never asked Lee for any documents to satisfy I-9 requirements because it never reached the point in the hiring process of asking for any I-9 documentation. The Declaration of Claire Soderburg, submitted with respondent's motion to dismiss, states further under oath that Lee was never asked for a social security card or any document for I-9 purposes, that he was never asked for a social security card for any purpose whatsoever, but that the social security number was requested for tax purposes.

Whatever terminology applies, there appears to be no dispute between the parties that AirTouch offered Lee a position which Lee accepted, that the offer was signed by both parties and that Lee reported to work on the agreed start date of September 7, 1995. He did not perform any work. The hiring process was aborted because AirTouch required a social security number. Whether these facts are characterized as a firing or as a refusal to hire, and whatever the respondent's reason was for requesting the social security number, the parties appear to agree that the process of completing the I-9 was never initiated.

In response to the remaining inquiry about the hiring process: "II 2c. Does complainant contend that AirTouch requested a social security number (or a social security card) for any purposes other than complying with relevant tax laws?," complainant stated:

> c. Question appears to be an attempt to lead this proceeding off point as shown stated (sic) by the ALJ in her discourse on the procedural history, where it is acknowledged that the respondent did not make a request for a number, but made a demand for the number a part of its hiring practices, in direct violation of 8 U.S.C. § 1324b, which bars and (sic) employer from requesting and therefore requiring specific documents. Also, as revealed in the cite of the position of the federal government in the case **EEOC V. ISC** (*supra)*, there is no requirement in the federal tax laws that an employer **demand** a social security number from a worker and that these laws do not require or prescribe the firing of workers who do not have numbers.
>
> Since the respondent connected a non-existent requirement under federal tax law to its hiring and firing practices, in regards to protected individuals such as the complainant which are governed under 8 U.S.C. 1324b, the request can only be connected to the hiring and firing practices of the employer as there is no relevant tax law supporting the firing of a worker who does not have a number.

The response evades the question asked. While complainant explains why he believes there is no requirement that an employer demand a social security number, he simply never answers the question of whether a number or a card was requested, and whether complainant contends the number was requested for any other purpose than compliance with tax laws. The response addressed the number only, and appears to assume that the number is a document.

In response to the next question, "d. If so, does complainant contend that respondent requested his social security number or a social security card to establish his 1) identity?, 2) eligibility to work in the United States?," or "3) both identity and eligibility to work in the United States?," complainant stated:

> d. Since the social security card was never created nor revised to be used for identification purposes, and is not listed in 8 U.S.C. § 1324a(b)(D) as a document used for proving identification, it is impossible for the complainant to have any legally valid reason to believe that the number/card was going to be used for identification purposes. Therefore, option one and 3 as given by the ALJ are plainly disqualified.
>
> The only answer can be number 2 as 8 U.S.C. § 1324a(b)(C) cites the card a (sic) proving authorization to work in the U.S., this is furthermore proven by the fact the employer connected the fact of the complainant's employment to the possession and submittal of the number and is now trying to hide behind an ethereal requirement for the number in the Internal Revenue Code as a justification for its violation of 8 U.S.C. § 1324b.

This response treats the question as if it were a riddle, and presents conclusions as to what the purpose "must have been" rather than factual allegations explaining complainant's contentions as to what it was. The point of the inquiry was not to pose a hypothetical question, but to ascertain specifically what complainant's contentions are. Complainant's reference to a "number/card" is disingenuous: the question was whether complainant requested a number or a card, not a "number/card." A social security number is not, of course, a "document" at all, thus a request for a social security number is not a request for a document. The complaint itself refers to a "number/card." Nowhere does the complaint allege unequivocally that respondent requested a social security card as opposed to a number; nowhere does the complainant's answer to the inquiry provide clarification as to what his specific contention is.

4. Representative's Qualifications

Complainant's representative was asked to file a statement detailing his qualifications to represent another person. He stated in his response that he has "significant experience with federal civil proceedings, is a former Police Officer, and has stated his intent an (sic) desire to comply with the standards of conduct as set forth in 28 C.F.R. § 68.35(a)." Complainant in addition disputes my authority to require anything more than the authorization signed by Lee and asserts that OCAHO rules, 28 C.F.R. § 68.33(b)(4) permit inquiry only into his authority, not his qualifications. Complainant acknowledges that 28 C.F.R. § 68.33(b) permits me to inquire into the qualifications of an attorney, but denies that I have the authority to make the same inquiry as to the qualifications of an individual who is not an attorney but who is acting in a representative capacity.

AirTouch's opposition states that Kotmair is a convicted felon, that he has failed to abide by the standards of § 68.35, and that he is motivated by the purpose of avoiding tax laws, not by efforts to address IRCA violations. It attaches exhibits consisting of A) the docket sheet for cause number M-80-0462 in United States District Court for an unidentified district, consisting of nine pages; B) an article about Mr. Kotmair from The Baltimore Sun dated June 18, 1995 and consisting of five pages; and C) a partial printout from an Internet web site, consisting of fourteen pages, for an organization allegedly having the same fax number as the National Worker's Rights Committee.

STANDARDS FOR RULING ON A MOTION TO DISMISS

A motion to dismiss should be granted only in the very limited circumstances where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). Thus in evaluating the motion to dismiss, I must view the allegations in the complaint in the light most favorable to complainant with all the well-pleaded factual allegations accepted as true, and with all

reasonable inferences drawn in favor of the complainant, but I am not required to accept as true any legal conclusions, facts which would be inadmissible at a hearing, or unwarranted inferences. All doubts must be resolved in favor of the nonmoving party. The question is not whether the complainant will prevail, but whether complainant is entitled to offer evidence in support of the claim.

In making the determination whether a claim has been stated, the assertions in the complaint must be liberally construed and the complainant is to be given every reasonable inference that can be drawn from the complaint. Walleri v. Fed. Home Loan Bank of Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996). This liberality does not, though, require that I assume that a complainant can prove facts which have not been alleged. See Associated Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983). Neither am I required to accept conclusory allegations as to the legal effects which flow from the events complainant sets out. The question is whether, based on a liberal construction of the complaint, there is any relief which could be granted based on the well-pleaded factual allegations. Even under the liberal pleading standards, complainant must allege more than unsupported conclusions of law to defeat an otherwise meritorious motion to dismiss. See, Pulda v. General Dynamics Corp., 47 F.3d 872, 878 (7th Cir. 1995). Even the liberal notice pleading standards have their limits and if there is no reasonable prospect that a valid claim can be made out based on the facts alleged, the motion to dismiss should be granted.

> However, it is clear that the court does not have to accept every allegation in the complaint as true in considering its sufficiency. Courts have used varying language to draw the line between what is admitted on the motion and what is not. For example, courts have said that they accept the truth of "facts,". . ."material facts,". . ."well-pleaded facts,". . . and "well-pleaded allegations.". . . They also have said that they do not accept "legal conclusions,". . ."unsupported conclusions,". . . "unwarranted inferences,". . . "unwarranted deductions,". . . "footless conclusions of law,". . . or "sweeping legal conclusions cast in the form of factual allegations."
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> Wright and Miller, Federal Practice and Procedure § 1357 (citations omitted).

Where allegations are based on information and belief, whether explicitly or implicitly, the complaint must set forth the source of the information and the reason for the belief. Conclusory averments as to another person's motive can only be taken as true where there is a sufficient factual basis from which the motive or intent may reasonably be inferred.

ANALYSIS

1. Allegations of National Origin Discrimination

Jurisdiction of OCAHO administrative law judges over cases alleging national origin discrimination claims is ordinarily limited to those cases involving employers of more than three

employees up to a ceiling of fourteen employees. 8 U.S.C. § 1324b(a)(2). Where an employer has fifteen or more employees (for each working day in each of twenty or more calendar weeks in the current or preceding calendar year), national origin claims will generally be covered under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., as amended, and accordingly will fall within the jurisdiction of the Equal Employment Opportunity Commission (EEOC).

The national origin charge must be dismissed for lack of jurisdiction, whether complainant elects to abandon it or not, because it is undisputed that at all relevant times respondent had more than 200 employees at the facility in question, well over the IRCA limit of 14, so that I am wholly without authority to entertain the claim of national origin discrimination.

2. Allegations of Citizenship Status Discrimination

In order to state a prima facie case of citizenship discrimination, a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. L.R.L. Properties v. Portage Metro. Hous. Auth., 55 F.3d 1097,1103 (6th Cir. 1995). While well-pleaded factual allegations and reasonable inferences therefrom are taken as true, conclusions of law and unsupported inferences need not be given the same deference.

Document abuse excepted, disparate or differential treatment is the essence of a discrimination claim. With the specific exception of § 1324b(6), the discrimination prohibited by 8 U.S.C. § 1324b is discrimination against a protected individual because of such individual's national origin or citizenship status. In the words of the Supreme Court, referring to Title VII: "The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Where citizenship status is the forbidden criterion, there must similarly be some claim or allegation that the individual is being treated less favorably than others because of his citizenship status.

In a long line of cases beginning with McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court developed the framework for disparate treatment analysis. In Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), it observed:

> Mc Donnell Douglas did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that such actions were based on a discriminatory criterion . . .
>
> . . .The central focus of the inquiry in a case such as this is always whether the employer is treating . . . some people less favorably than others. . ..

438 U.S. 576-77. The standard was further explained in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The burden of stating a prima facie case of disparate treatment is far from onerous. All an applicant must do is to allege 1) he is a member of a protected class, 2) the employer had an open position for which he applied or sought to apply, 3) he was qualified for the position, and 4) he was rejected under circumstances giving rise to an inference of unlawful discrimination. Evans v. Technologies Applications and Service Company, 80 F.3d 954, 959 (4th Cir. 1996) citing Burdine, 450 U.S. at 253. It is this last element which is wholly unsatisfied here.[7]

Ordinarily once a complainant states a prima facie case, the burden of production shifts to the employer to present a legitimate non-discriminatory reason for its employment action. St. Mary's Honor Cntr. v. Hicks, 509 U.S. 502 (1993). However, if the complainant fails to limn a prima facie case, the inference of discrimination never arises and the employer has no burden of production. Mesnick v. Gen. Elec. Co., 950 F.2d 816, 824 (1st Cir. 1991) cert. denied 504 U.S. 985 (1992).

Here the complainant has set forth in his own submissions the reason for the employer's action--that complainant declined to furnish a social security number [8]--and argues that this reason is itself a pretext for citizenship status discrimination. In the absence of a prima facie case, however, I have no occasion even to reach the question of whether a legitimate non-discriminatory reason has been articulated. I gave complainant the opportunity by the order of inquiry to bring forward any facts which would support an inference that other applicants or employees of different nationalities or citizenship were treated differently. Complainant's response was that my question is irrelevant. Absent assertions that others were treated more favorably, the citizenship status allegations must be dismissed.

3. Allegations of Document Fraud

Accompanying Lee's response to the order of inquiry is an explanation of his view of the meaning of 8 U.S.C. § 1324b (a)(6); that view appears to be that the statutory prohibitions governing an employer's request for specific documents and/or an employer's refusal to accept

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[7] Neither has complainant set forth a prima facie case based on his allegations he was fired because to do so requires allegations that the complainant 1) is a member of a protected class, 2) was discharged, 3) was qualified, and 4) was replaced by or treated less favorably than another employee not in the protected class. See, e.g., Naas v. Westinghouse Elec. Corp., 818 F. Supp. 874, 877 (N.D. Ga. 1993), Miller v. Yellow Freight Systems, Inc., 758 F. Supp. 1074, 1077 (W.D. Pa. 1991).

[8] The dispute between the parties appears to be over whether complainant is subject to withholding for income and social security taxes. These are issues of tax law rather than of employment discrimination.

an applicant's tendered documents are general prohibitions, so that a request or refusal need not be linked to the I-9 process in order to state a violation. Complainant's theory is thus that AirTouch's hiring process is per se illegal because a request is made for a social security number as part of the process. Because a request for a social security number is not a request for a document at all, this theory does not implicate any issues which come within the jurisdiction of OCAHO. Cf. Lewis v. McDonald's Corp., 2 OCAHO 383 (1991)[9]. As noted supra, nowhere does complainant state that respondent requested a social security **card,** much less that a card was requested as part of the employment eligibility verification process. All of Lee's submissions refer to a request for a social security number, or for a "number/card". In response to my questions in the order of inquiry seeking clarification as to what Lee's contentions actually are, there was no clear answer.

To the extent that the complaint asserts the undisputed fact that AirTouch requested a social security number as a condition of employment, the complaint fails to state a claim upon which relief may be granted in this forum. Westendorf v. Brown & Root, 3 OCAHO 477 (1992). To the extent that Lee declined to clarify what a "number/card" is, or to state unequivocally that a card itself was ever requested, the complaint fails to state a claim upon which relief may be granted in this forum. Even assuming arguendo that a card had been requested, no claim justiciable in this forum would be stated in the absence of some colorable assertion that it was requested in connection with the employment eligibility verification process; an assertion which Lee's response to my order of inquiry makes perfectly clear that he rejects.

Lee's exposition of the governing law appears to be dependent upon the misconception that an employer may not request a specific document from an applicant for employment for any purpose whatsoever, and that an employer has an obligation to accept any document tendered by an applicant for any purpose whatsoever, quite independent of the employment eligibility verification process. Lee argues that an employer's refusal to honor documents as referred to in § 1324b "is not in any way connected to the I-9 requirement." His response to the order of inquiry thus observes:

> The attempt of the ALJ to restrict this proceeding to only the request of specific documents is not an entirely honest approach to this matter as 8 U.S.C. § 1324b(a) clearly gives the DOJ authority over the whole aspect of employment, therefore, the attempt to throw this portion of the compliant (sic) out for not being linked to the I-9 is not completely honest to the letter of the law. As revealed previously in this ANSWER, the DOJ has ultimate authority under the law as for the protection of the rights of protected individuals, and there is no legal

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[9] Citations to OCAHO precedents reprinted in the bound Volume 1, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, reflect consecutive pagination within that bound volume, pinpoint citations to Volume 1 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

> requirement under any other federal law requiring that the complainant provide a social security number/card which can defeat the authority of the U.S. Department of Justice over the employment practices of employers in regards to protected individuals.

Jurisdiction of administrative law judges over allegations of document abuse is limited by the terms of the governing statute itself. Section 1324b(a)(6) renders unlawful a request for specific documents "for purposes of satisfying the requirements of section 1324a(b)", a clear reference to the employment eligibility verification system. Similarly, the prohibition against an employer's refusal to honor documents tendered, notwithstanding Lee's assertions to the contrary, refers to the documents described in § 1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents Lee asserts that AirTouch refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine. Cf. Toussaint v. Tekwood Associates, Inc., 6 OCAHO 892 at 18 - 21 (1996) and cases cited therein.

4. The Request for Exclusion

In view of the foregoing, the question of representation is moot and accordingly, I reach no conclusions as to the issues posed by this request.

BRIEFING SCHEDULE FOR ATTORNEYS FEES

Respondent shall file its itemized request for attorneys fees together with supporting documentation and brief by December 27, 1996.

Complainant shall file his brief and supporting data by January 24, 1997.

If appropriate, the request for attorneys fees may be set for oral argument or for hearing after the written materials are received.

CONCLUSION

Respondent's motion to dismiss the complaint is granted. The allegations of national origin discrimination are dismissed for lack of jurisdiction. The allegations of citizenship status discrimination and document abuse are dismissed for failure to state a claim upon which relief may be granted. Jurisdiction is retained pending resolution of the request for attorneys fees.

SO ORDERED

Dated and entered this 21st day of November, 1996.

_____

Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 1996, I have served copies of the foregoing Order of Dismissal and Briefing Schedule for Attorneys Fees Request on the following persons at the addresses indicated:

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